Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 89-370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOE NATHAN PRICE,
Petitioner,
V.
DIGITAL EQUIPMENT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DIGITAL EQUIPMENT
CORPORATION

OF COUNSEL:

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Houston, Texas

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QUESTION PRESENTED

Whether The Court Of Appeals, In The Exercise Of Its Discretion, May Dismiss An Appeal When The Appellant Does Not Address The Only Pertinent Issue For Review

PARTIES

All parties to the proceeding are identified in the caption of the case.

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NO. 89-370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOE NATHAN PRICE,
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V.

DIGITAL EQUIPMENT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Digital Equipment Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's judgment in this case. That judgment, without opinion, was rendered on May 4, 1989. Petitioner's Motion for Reconsideration was denied on June 6, 1989.

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit and its denial of Petitioner's Motion for Reconsideration have not been reported and are reprinted in the appendix hereto, 1a, 2a, *infra.*

JURISDICTION

This Court has jurisdiction to review judgments of the court of appeals under 28 U.S.C. § 1254(1). No constitutional issue, under the Fourteenth Amendment or otherwise, is implicated in this case.

RULES INVOLVED

Fed. R. App. P. 28:

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . . .

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record . . . .

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

. . . .

5th Cir. L.R. 28.2.3:

> 28.2.3 Record References. Every assertion in briefs regarding matter in the record shall be supported by a reference to the page number of the original record where the matter relied upon is to be found.

STATEMENT OF THE CASE

Petitioner Price's complaint in the United States District Court for the Southern District of Texas was dismissed by the district court for failure to comply with an order compelling discovery. Mr. Price noticed an appeal, and filed a brief in the Court of Appeals for the Fifth Circuit. Digital Equipment moved to dismiss the appeal because Mr. Price 's papers did not address the order from which he appealed or submit an intelligible argument with record references as required by Fed. R. App. P. 28(a) and 5th Cir. L.R. 28.2.3. Granting Digital Equipment's motion, the court of appeals dismissed Mr. Price's appeal on May 4, 1989. On June 6, 1989, the court of appeals denied his Motion for Reconsideration. Mr. Price petitioned this Court for writ of certiorari on August 29, 1989. Digital Equipment now opposes Mr. Price's petition because, yet again, he fails to address in his papers the order from which he appeals.

SUMMARY OF ARGUMENT

The petition should be denied because it ignores the Fifth Circuit's order on which Mr. Price's appeal must necessarily be based, thus disregarding Rule 21.5 and waiving his right to review. Alternatively, no significant issue warranting review by this Court is raised in determining whether Mr. Price's papers satisfied the Fifth Circuit's rules on briefing appellate issues.

ARGUMENT

I. The Petition Fails To Present A Clear, Accurate, And Concise Statement Of The Facts And Issues Involved In This Matter And Should Be Denied.

Rule 21.5 of the Supreme Court Rules provides:

> [T]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

In presenting his Petition for Writ of Certiorari, Mr. Price chooses not to address the Fifth Circuit's order dismissing his appeal, the pertinent rules of appellate procedure supporting the court of appeal's decision or any facts that would support a review of the Fifth Circuit's final order by this Court. Instead, consciously ignoring the Fifth Circuit's order, Mr. Price presents nebulous questions about one's right to a jury trial and the applicability of statutes and trial court orders to him, and burdens the court with irrelevant and repetitious factual allegations never properly presented in the record.

Neither the Court nor Respondent is responsible for divining from Mr. Price's papers a significant justification for including this matter on its certiorari docket. Rule 21.5 requires the petitioner to frame the issue for review. In the absence of a clear statement articulating why the Fifth Circuit's order is wrong, Mr. Price offers this Court no ground on which it may prudently decide to invest the Court's limited time for hearing cases on certiorari. Consistent with the general purposes to be served by a petitioner's compliance with Supreme Court rules, and in accord with the specific warnings of Rule 21.5, Mr. Price's Petition for Writ of Certiorari should be denied because it does not articulate an intelligible issue for this Court's consideration.

II. Petitioner's Failure To Address The Only Pertinent Issue—The Propriety Of The Fifth Circuit's Order Of Dismissal—Constitutes A Waiver Of Any Right To Review And Justifies Denial Of His Petition.

Supreme Court Rule 21.1(a) directs, *inter alia,* that a petition for writ of certiorari "shall contain" the specific questions presented for review. Only the questions set forth in the petition or fairly included therein will be considered by the Court. *Phillips v. Dumas School District,* 361 U.S. 376, 386 n. 12 (1960).

The only possible issue for consideration is whether the court of appeals properly exercised its discretion in dismissing Price's appeal. Although that dismissal was issued without an accompanying explanatory opinion, one may easily infer the basis of the decision. The Order of Dismissal notes explicitly that it grants Digital Equipment Corporation's Motion to Dismiss (see Appendix at 3a), a motion based on Mr. Price's failure to address the order from which he appealed or to submit a brief conforming to Fed. R. App. P. 28 and 5th Cir. L.R. 28.2.3. The Fifth Circuit has long been unwilling to entertain appeals in which the appellant is unable either to articulate an issue for appeal or to argue how and why it was incorrectly decided in the lower court. *See McGruder v. Necaise,* 733 F.2d 1146, 1148 (5th Cir. 1984).

The only pertinent issue that could arise from the Fifth Circuit's dismissal of Petitioner's appeal—whether the courts of appeals may require the submission by an appellant of a comprehensible statement of the basis for the appeal—is neither articulated nor argued by Petitioner. Because Mr. Price has failed to identify any reviewable issue related to the court of appeals' Order of Dismissal, he has waived any such issues, and his Petition for Writ of Certiorari should be denied. *Cf. United States v. Bass,* 404 U.S. 336, 339 n. 4 (1971); *Mazer v. Stein,* 347 U.S. 201, 206 n. 5 (1954).

III. Even If Price's Petition May Be Deemed To Have Articulated And Argued The Pertinent Issue, No Question Of Sufficient Legal Significance Or Inter-Circuit Conflict Has Been Raised To Justify Supreme Court Review.

Assuming, *arguendo*, that Mr. Price's Petition adequately presented an issue related to the Fifth Circuit's dismissal of his appeal, he has not provided any reason why that issue warrants inclusion on the Court's docket. Clearly, an appellant's failure to submit an intelligible brief, identifying the facts with appropriate record citations and defining the issues on appeal, has not and will not become the source of inter-circuit conflict. In fact, those circuits that have been confronted with briefs consisting of unintelligible issues and undocumented allegations have agreed that such appeals have thereby been abandoned. *See, e.g., Federal Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir. 1987); *United States v. Loya*, 807 F.2d 1483, 1486-87 (9th Cir. 1987); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *Markowitz & Co. v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 704 (6th Cir. 1979); *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 602 (2d Cir. 1978); *Virginians for Dulles v. Volpe*, 541 F.2d 442, 444 (4th Cir. 1976). In addition, although Respondent's research indicates that this Court has never directly addressed the prerogatives of the courts of appeals in insisting upon an intelligible foundation on which to base appellate review, this Court's promulgation of Supreme Court Rule 21.5 and Fed. R. App. P. 28 demonstrates its recognition that such appellate procedures are indispensable. It is unlikely that the question is of such importance as to justify the expenditure of this Court's judicial time and energy. *See Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *United States v. White*, 454 F.2d 435 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972).

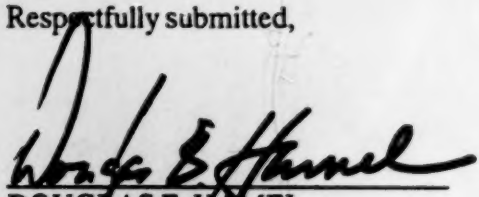
Absent such an issue, Mr. Price's petition is left as it stands, a rambling account without support in the record of Mr. Price's view

of the particular facts in his case. This Court does not review on certiorari whether the court of appeals properly reviewed facts peculiar to a single individual's case which do not present an issue of immediate public significance. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Layne v. Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

Petitioner's failure to present accurately and coherently the legal issues and supporting arguments for appeal, a failure previously dispositive in the dismissal of his appeal before the Fifth Circuit, is now revisited in his Petition for Writ of Certiorari. His petition has no legal significance beyond its ramifications for Petitioner personally, and its uniqueness in this respect should preclude review by this Court. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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NO. 89-370

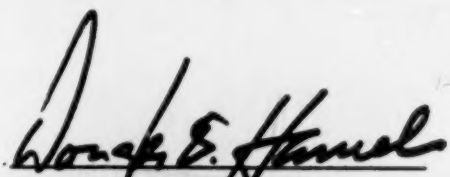
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOE NATHAN PRICE,
Petitioner,
V.
DIGITAL EQUIPMENT CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

I, Douglas E. Hamel, a member of the bar of this Court, hereby certify that on the 27th day of October, 1989, three copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Joe Nathan Price, Pro Se, 22131 North Fork Drive, Katy, Texas 77450. By so doing, I certify that all parties required to be served have been served.



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
June 6, 1989
GILBERT F.
GANUCHEAU,
CLERK

JOE NATHAN PRICE,
Plaintiff-Appellant,

versus

DIGITAL EQUIPMENT CORPORATION
Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the

Southern District of Texas

- - - - -

Before REAVLEY, JONES and DUHE, Circuit Judges
BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss the appeal is granted.

IT IS FURTHER ORDERED that appellee's alternative motion to strike appellant's brief is moot.

IT IS FURTHER ORDERED that appellee's motion for an extension of time to and including two weeks after the Court rules on its motion to dismiss within which to file its brief is moot.

J.M.D. 5/26/89 M.R. 5/31/89 E.D. 6/2/89

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
May 4, 1989
GILBERT F.
GANUCHEAU,
CLERK

No. 89-2141

JOE NATHAN PRICE,
Plaintiff-Appellant,

versus

DIGITAL EQUIPMENT CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

Before REAVLEY, JONES and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of this court's order dated May 4, 1989 granting appellee's motion to dismiss is denied.

J.M.D. 4/26/89 M.R. 5/1/89 E.D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOE NATHAN PRICE,	§	
Appellant,	§	
v.	§	NO. 89-2141
DIGITAL EQUIPMENT CORPORATION,	§	
Appellee.	§	

APPELLEE'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STRIKE APPELLANT'S BRIEF

Digital Equipment Corporation moves to dismiss this appeal, or, in the alternative, to strike Joe Nathan Price's brief. To support this motion, Appellee states:

1. Appellant's brief does not address the Order of Dismissal from which he appeals. This constitutes a waiver of the issues presented on appeal, and prejudices Appellee in that it cannot respond effectively to Appellant's brief. Alternatively, Appellant's brief is permeated with unsupported assertions not in the record and not before the district court which are improperly before this Court.

2. The district court dismissed Mr. Price's case for failure to comply with the court's discovery order.[1] On November 3, 1988,

---

1/ This is not the first time that an action by Mr. Price against Digital has been dismissed for failing to comply with a court's orders. See Order of Hon. James DeAnda, denying Mr. Price's motion to reinstate CA H-86-503, Mr. Price's prior action against Digital, also alleging discrimination. This Order is Exhibit 6 to Defendant's Motion to Dismiss in this action. This motion is attached as Exhibit B hereto.

the Court ordered Mr. Price to respond to Digital's interrogatories by December 1, 1988. *See* Order, attached as Exhibit "A". Mr. Price did not respond and Digital thereafter moved to dismiss. *See* Motion to Dismiss, attached hereto as Exhibit "B". The motion also requested attorney's fees based on Mr. Price's bad faith as authorized by Rule 37.

The district court granted Digital's Motion to Dismiss, and awarded Digital $500.00 in attorney's fees and expenses. *See* Order, attached hereto as Exhibit "C". Mr. Price filed a Notice of Appeal from this Order requesting that this Court review "the Order entered by Judge Lynn N. Hughes on January 20, 1989, on Digital Equipment Corporation's Motion for Dismissal." *See* Notice of Appeal, attached as Exhibit "D".

3. Mr. Price's brief, subsequently filed with this Court, does not address the order of dismissal. Instead, it states the issue presented for review as: "Whether or not the District Court erred in granting the Defendant Summary Judgment and if Plaintiff is entitled to a Fair Trial (JURY TRIAL) in a Federal Court of Law." Brief of Appellant at 7. The balance of Mr. Price's brief, in a rambling and disjointed manner, addresses summary judgment and his general claims of discrimination by continuous reference to new material not in the record or before the district court in the form of unsupported allegations of fact and affidavits attached to the brief. Digital is prejudiced in its attempts to respond to this brief, in that it does not present any argument pertaining to the order of dismissal, which is the final judgment appealed from, and presents no argument from the record but relies entirely on material outside the scope of review.

4. This case was previously before this Court on appeal from a summary judgment in the district court holding that Mr. Price's employment discrimination suit was time barred. Although it was the principle issue on appeal, in his brief Mr. Price only addressed

the limitation issue in "summary fashion." *Price vs. Digital Equipment Corporation*, 846 F.2d 1026, 1027 (5th Cir. 1988).

Due to the inadequate brief, Digital sought to have the Appellant's argument on limitations deemed waived. This Court declined to do so because no prejudice was shown:

> The only reference appellant makes to the district court's dismissal of his lawsuit as time barred is to assert that "this action is not time barred." This fleeting reference points to the claimed error, but gives no analysis or authorities to support the assertion. Although we liberally construe the briefs of pro se appellants, *Abdul-Alim Amin vs. Universal Life Insurance Co.*, 706 F.2d 638, 640 n.1 (5th Cir. 1983), we also require that arguments must be briefed to be preserved. *In re Texas Mortgage S., Inc.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985). If appellee had suggested any prejudice that resulted from appellant's inadequate brief, we would probably consider in the limitations issued waived. But we are unable to perceive any prejudice to appellee from appellant's deficient brief.

Id. at 1028. This Court affirmed the summary judgment with regard to Appellant's Title VII claims, but vacated the judgment with regard to Appellant's claim of discriminatory discharge under 42 U.S.C. § 1981. This Court held the Section 1981 claim timely filed, and remanded the case to the district court. *Id.* at 1027-28.

5. In this appeal from the decision of the district court on remand, Digital is indeed prejudiced by Mr. Price's failure to brief his appeal as required in Fed. R. App. P. 28. The district court ordered Appellant's case dismissed for failure to comply with a discovery order. It did not grant summary judgment. However, Mr. Price's brief addresses the appropriateness of summary judgment in a Title VII action, and the merits of his Title VII claim, neither of which are appropriate issues on this appeal. The brief also includes evidence, in the form of affidavits from unrelated third parties, that

was not before the district court. Even "liberally construing" this brief, Appellee is prejudiced because it cannot respond to a brief that does not address the order of dismissal appealed from and is permeated with material not before the Court.

The standard of review for a motion for summary judgment is "whether there is any genuine issue as to any material fact, and whether movant is entitled to summary judgment as a matter of law." *Caulter vs. Texaco, Inc.*, 714 F.2d 467 (5th Cir. 1983). In contrast, the standard of review for a Rule 37 dismissal as a discovery sanction is abuse of discretion. *Eastway General Hospital, Ltd. vs. Eastway Women's Clinic, Inc.*, 730 F.2d 503 (5th Cir. 1984), *cert. denied,* 105 S. Ct. 1752 (1985).

Even liberally construed, Appellant's brief does not to address the District Court's proper exercise of its discretion regarding its dismissal of Appellant's case. Appellee should not be required to construct a reply brief in the vacuum created by Appellant's failure to address the order of dismissal that he has appealed from. Furthermore, Appellee should not be required to sift through Appellant's extraneous ramblings and material to parse out any potentially relevant points.

6. Appellant's brief is in clear violation of F. R. App. Proc. 28 and this Court's rules. It does not identify, or address, the only possible issue on appeal and it does not cite any relevant authority as required by Rule 28. It makes absolutely no reference to the record to support is assertions as required by Local Rule 28.2.3, and supplements the record with irrelevant material that was not before the district court.

7. Aside from the above matters, as this Court stated in its opinion on Appellant's prior appeal, arguments not briefed on appeal are deemed to be waived. *Price*, 846 F.2d at 1028, *citing In re Texas Mortgage Services Corp.*, 761 F.2d at 1072-73. The only possible issue in this appeal is whether the District Court properly exercised its discretion in dismissing this matter as a discovery sanction. Because Appellant has failed to address this issue on ap-

peal, he has waived the only pertinent issue, and the appeal should be dismissed.

WHEREFORE, Appellee asks this Court to enter an Order either dismissing the appeal, or striking Appellant's brief and directing Appellant to address the basis of the District Court's Order entered January 20, 1989.

Respectfully submitted,

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(713) 651-2036
Attorney for Appellee Digital Equipment Corporation

OF COUNSEL:
VINSON & ELKINS
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Houston, Texas 77002

CERTIFICATE OF SERVICE

Counsel for Appellee hereby certifies that a copy of the foregoing motion was served upon Appellant, pro se, by first class United States mail, certified, return receipt requested, on this 13th day of April, 1989, at the address below:

Mr. Joe Nathan Price
22131 North Fork Drive
Katy, Texas 77450

Douglas E. Hamel
Attorney for Appellee

1. 5th Cir. R. 28

28.1 Briefs—Length. Except by permission of the Court, principal briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. regardless of the form of printing or reproduction used. Motions for leave to file briefs in excess of the page requirements of this rule must be filed at least 10 days in advance of the due date of the brief. The Court looks with disfavor upon motions to exceed the page limitation and such a motion will only be granted for extraordinary and compelling reasons.

28.2 Briefs—Contents.

28.2.1 Certificate of Interested Persons. A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each such certificate shall also list the names of opposing law firms and/or counsel in the case.

Each such certificate of counsel shall list *all* persons known to counsel to be so interested, on all sides of the case, whether represented by counsel furnishing the certificate or not. The burden is on counsel to ascertain and certify the true facts to the Court.

The certificate shall be in the following form:

Number and Style of Case.

The under signed counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____

Attorney of record for _____

(Amended Oct. 1, 1987.)

28.2.2 Summary of Argument. In addition to the requirements of FRAP 28, the opining briefs of the parties shall contain a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two and never five pages.

28.2.3 Record References. Every assertion in briefs regarding matter in the record shall be supported by a reference to the page number of the original record where the matter relied upon is to be found.

28.2.4 Request for Oral Argument. Counsel for appellant shall include in appellant's brief (as a preamble thereto) a short statement of the reasons why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee shall likewise include in appellee's brief a statement of why oral argument should or need not be had. The Court will accord these statements due, though not controlling, weight in determining whether oral

argument will be heard in the case. See FRAP 34(a) and (f) and Loc. R. 34.2.

28.2.5 Statement of Jurisdiction. Each principal brief shall include a concise statement of the statutory or other basis of the jurisdiction of this Court, containing citations of authority when necessary.

28.3 Brief—Order of Contents. The order of contents of the brief, as governed by FRAP 28 and this Local Rule, shall be as follows:

Certificate of interested persons, if required.

Statement regarding oral argument.

Table of contents and citations.

Statement of jurisdiction.

Statement of issues.

Statement of the case.

(i) Course of proceedings and disposition in court below.

(ii) Statement of facts.

Summary of the argument.

Argument.

Conclusion.

Certificate of Service.